Supreme Court, U. S.
FILED
AUG 29 1975

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1396

MICHELIN TIRE CORPORATION,
Petitioner,

vs.

W. L. WAGES, TAX COMMISSIONER, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF GEORGIA

BRIEF OF STATE OF KANSAS AND JOHNSON COUNTY, KANSAS AS AMICI CURIAE

Of Counsel:
F. KENT KALB
General Counsel
Department of Revenue
WILLIAM F. ALDRIDGE
Chief Attorney
Property Valuation Division
State Office Building
Topeka, Kansas 66612

CURT T. SCHNEIDER
Attorney General of Kansas
JONATHAN P. SMALL
CLARENCE J. MALONE
Assistant Attorneys General
State Capitol
Topeka, Kansas 66612
LYNDUS A. HENRY
County Counselor
Johnson County, Kansas
BERNIS G. TERRY
Special Counsel
Johnson County Courthouse
Johnson County, Kansas
Olathe, Kansas 66061
Attorneys for the Amici

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-3930

INDEX

Opinions Below 1

Question Presented 2

Interest of Amici Curiae 2

Argument:

Petitioner So Acted Upon Its Property That It Became a Part of Petitioner's Inventory and Became Incorporated and Mixed With the Mass of the Property in the Country, Thus Losing Its Character As an Import 3

Conclusion 14

Citations

Cases Cited

American Mannex Corporation v. *Cronvich*, 251 La. 1014, 207 So.2d 778 (1968) 8

Brown v. *Maryland*, 25 U.S. (12 Wheat.) 419, 6 L.Ed. 678 (1827) 3, 4, 5

F. May & Company v. *City of New Orleans*, 178 U.S. 496, 44 L.Ed. 1165, 20 S.Ct. 976 (1900) 3

E. J. Stanton & Sons v. *Los Angeles County*, 78 Cal. App. 2d 181, 177 P.2d 804, cert. den. 332 U.S. 766, 92 L.Ed. 352, 68 S.Ct. 75 (1945) 7, 8

Hooven & Allison Co. v. *Evatt*, 324 U.S. 652, 89 L.Ed. 1252, 65 S.Ct. 870 (1945) 5

Volkswagen Pacific, Inc. v. *City of Los Angeles*, 101 Cal. Rptr. 869, 496 P.2d 1237 (1972) 3, 4, 9, 10, 11

Youngstown Sheet & Tube Co. v. *Bowers*, 358 U.S. 534, 3 L.Ed.2d 490, 79 S.Ct. 383 (1959) 5, 6, 7, 8

CONSTITUTION CITED

Constitution of the United States, Article I, Section 10, Clause 2 2

TEXTS CITED

Annotation: 26 A.L.R. 971 (1923) 3

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1396

MICHELIN TIRE CORPORATION,
Petitioner,

vs.

W. L. WAGES, TAX COMMISSIONER, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF GEORGIA

BRIEF OF STATE OF KANSAS AND JOHNSON COUNTY, KANSAS AS AMICI CURIAE

OPINIONS BELOW

The opinion of the Supreme Court of Georgia (Pet. App. B, pp. A-6—A-18) is reported at 214 S.E.2d 349.

QUESTION PRESENTED

Whether tires imported by petitioner in bulk and without individual packaging, which, after arrival at its warehouse, were sorted and separated as to size and style and stacked on wooden pallets with other tires in the warehouse so that individual shipments were no longer separate and identifiable units, are nonetheless immune from local ad valorem taxes by reason of Article I, Section 10, Clause 2 of the Constitution of the United States?

INTEREST OF AMICI CURIAE

The *amici curiae* respectfully submit their brief pursuant to Supreme Court Rule 42(4). The specific reason that *amici curiae* are concerned in this matter is that they are presently involved in litigation with petitioner herein, Michelin Tire Corporation, on facts substantially similar to those presented herein, and that the Johnson County (Kansas) District Court rendered a decision in favor of the State of Kansas and Johnson County, Kansas which ostensibly parallels that of the Georgia Supreme Court's decision. (*Michelin Tire Corporation* v. *Board of County Commissioners, et al.*; Case Nos. 54594, 45432, 58006 and 59905; decision dated July 1, 1975.)

ARGUMENT

Petitioner So Acted Upon Its Property That It Became a Part of Petitioner's Inventory and Became Incorporated and Mixed With the Mass of the Property in the Country, Thus Losing Its Character As an Import

Petitioner claims that the unpackaged imported tires held for sale and distribution by petitioner in its warehouse were in the original form in which they were imported and, relying upon *Brown* v. *Maryland,* 25 U.S. 419 (1827), asserts that they were immune from local taxation.

Parenthetically, the *amici* take the position in Kansas that the container or sea van is the original package. In *F. May & Company* v. *City of New Orleans,* 178 U.S. 496, 44 L.Ed. 1165, 20 S.Ct. 976 (1900), although it was contended by the importer that the box, case or bale was not the original package but that each separate parcel or bundle placed within such box, case or bale was itself an original package. *Id.* at 502, 44 L.Ed. 1167, 20 S.Ct. at 978, this Court concluded that the original package was the box or case in which the separate parcels were shipped. *Id.* at 509, 44 L.Ed. at 1170, 20 S.Ct. at 981. In an annotation entitled "What is an 'original package' within interstate or international commerce?" [26 A.L.R. 971 (1923)], it is stated:

> "It is well settled that where an aggregation of articles or packages is for convenience in shipping, packed and shipped in a larger package or receptacle, such larger package or receptacle and not the individual articles or packages comprising the larger unity, constitutes the original package of commerce." (*Id.* at 974-975)

In *Volkswagen Pacific, Inc.* v. *City of Los Angeles,* 101 Cal. Rptr. 869, 496 P.2d 1237 (1972), appellant wholesaler

imported, *inter alia,* automobile parts in sea vans and Volkswagen and Porsche automobiles. The California court concluded at p. 875 that:

> "Uncontroverted evidence shows that once the individual packages were removed from the sea van, VW and Porsche distributed those packages to local dealers. Hence, even if VW and Porsche acted as importers up to the moment that the vans were brought to the warehouse, once they entered the vans to remove the individual packages they did so with the intent and effect to act as wholesalers in 'the mass of property in the country. . . .' (*Brown* v. *Maryland, supra,* 25 U.S. at 441.) Therefore, they cannot avail themselves of the constitutional immunity from local taxation." 496 P.2d at 1243.

However, since the Supreme Court of Georgia in the instant case declined to accept that theory, presumably that issue is no longer involved in this matter as far as the respondents are concerned.

The *amici* contend that petitioner attempts to rely on a mechanistic approach to the solution of the problem and attributes a controlling significance to *Brown, supra,* that, if it ever did exist, certainly no longer exists. Even in *Brown, supra,* the Court recognized that the problems under the export-import clause are not susceptible to easy solution noting as a preliminary to the rule cited by petitioner, that:

> "The power [to tax persons and property], and the restriction on it, though quite distinguishable when they do not approach each other, may yet, like the intervening colors between white and black, approach so nearly as to perplex the vision in marking the distinction between them. Yet the distinction exists, and must be marked as the cases arise. Until they do arise, it might be premature to state any rule as being universal in its application." *Brown* v. *Maryland,* at p. 439.

In *Hooven & Allison Company* v. *Evatt,* 324 U.S. 652, 667, 89 L.Ed. 1252, 65 S.Ct. 870 (1945), the Court held that goods imported for use share the same immunity as goods imported for sale and that goods imported for manufacture do not lose their character as imports any sooner or more readily than imports for sale.

Subsequently, the Court in *Youngstown Sheet & Tube Co.* v. *Bowers,* 358 U.S. 534, 3 L.Ed.2d 490, 79 S.Ct. 383 (1959), consolidated cases involving, on the one hand, the importation of ore for use in a manufacturing process and, on the other hand, the importation of lumber and veneer, some as loose boards and some in bundles, for use in the manufacturing process, the court concluded:

> "Whatever may be the significance of retaining in the 'original package' goods that have been so imported for sale . . . goods that have been so imported for use in manufacturing are not exempt from taxation, though not removed from the 'original package' if, as found here, they have been 'put to the use for which they were imported'." *Id.* at 548, 3 L.Ed.2d at 490, 79 S.Ct. at 391.

The Court, noting that breaking the original package was only one of the ways by which packaged goods may lose their distinctive character as imports, stated that another way was by putting them to the use for which they were imported.

> "The materials here in question were imported to supply, and were essential to supply, the manufacturer's current operating needs. When, after all phases

of their importation had ended, they were put to that use and indiscriminate portions of the whole were actually being used to supply daily operating needs, they stood in the same relationship to the State as like piles of domestic materials at the same place that were kept for use and used in the same way. The one was then as fully subject to taxation as the other. In those circumstances, the tax was not on 'imports', nor was it a tax on the materials because they have been imported, but because at the time of assessment they were being used, in every practical sense, for the purposes for which they had been imported. They were therefore subject to taxation just like domestic property that was kept at the same place in the same way for the same use." *Id.* at 549-550, 3 L.Ed.2d at 500-501, 79 S.Ct. at 392.

Then the Court recognized the underlying economic consideration involved in the *Youngstown* case (which is necessarily involved in this case also):

> "We cannot impute to the Framers of the Constitution a purpose to make such a *discrimination in favor of materials imported from other countries* as would result if we approved the views pressed upon us by the manufacturers. Compare *May* v. *New Orleans*, 178 U.S. at page 509, 20 S.Ct. at page 980." *Id.* at 550, 3 L.Ed.2d at 501, 79 S.Ct. at 392. [Emphasis supplied.]

Earlier in the opinion the Court had defined the purpose of the export-import exception:

> "The constitutional design was then to immunize imports from taxation by the importing States, and all others through or into which they may pass, so long as they retain their distinctive character as imports. Hence, that design is not impinged by the taxation of

> materials that were imported for use in manufacturing after all phases of the importation have ended and the materials have been 'put to the use for which they [were] imported' . . . for in such a case they have lost their distinctive character as imports and are subject to taxation." *Id.* at 545, 3 L.Ed.2d at 498, 79 S.Ct. at 389.

Thus, the Court recognized in *Youngstown* that to extend the period of exemption beyond that needed for completion of the importation process would discriminate against persons or firms dealing in domestic supplies. The Court spoke so unequivocally in *Youngstown* that, in a sense, the real issue in this case is whether the petitioner can sufficiently distinguish the facts of its case so as to avoid the consequences of the *Youngstown* decision.

To hold in this case that petitioner, in competition with other firms in Georgia and Kansas distributing and selling tires, may receive and enjoy the municipal benefits provided by ad valorem taxation after the Federal import duties have been paid and after the importation process has been completed without payment to such ad valorem taxes would be to ignore the defined purpose of the export-import laws, as decribed in the *Youngstown* case and to constitute a violation of the equal protection clause of the Fourteenth Amendment of the United States Constitution.

Predating the *Youngstown* case was the California case of *E. J. Stanton & Sons* v. *Los Angeles County*, 78 Cal. App. 2d 181, 177 P.2d 804, cert. den. 332 U.S. 766, 68 S.Ct. 75, 92 L.Ed. 352 (1945), concerning lumber shipped from overseas. The importer contended that so long as any parcel of the entire lot remained in the possession of the importer, it was not subject to state taxation prior to sale and that each parcel or board was marked so as to distinguish it from all others and, therefore, in itself was an original package.

The County defendants argued that by the sorting, segregating and tallying of the timbers, and by virtue of sales from the cargoes received, the remainder being offered for sale became a part of the mass of property in the country and thus subject to taxation. *Id.* at 183-184, 177 P.2d at 805-806. The Court held that the unit of importation was the original package and not its constituent elements; that is, the cargo or whole shipment itself and, when, even though in the warehouse of the importer, it was sorted and classified as to facilitate its sale, and portions thereof were sold until the pile was depleted and the remnants thereof were commingled with new shipments of the same type of timbers, a reasonable construction of Section 10 and interpreting decisions compelled the termination of immunity of such broken lots and commingled remnants of imported lumber. *Id.* at 187-189, 177 P.2d at 807-808.

Subsequent to the *Youngstown* opinion, a somewhat similar case confronted the Supreme Court of Louisiana in *American Mannex Corporation* v. *Cronvich*, 251 La. 1014, 207 So.2d 778 (1968), involving shipments of tubular steel oil well casings. The issue, as posed by the court, was whether articles which, because of their physical nature, are inexpedient, inconvenient or too costly to transport in packages, were to be considered as separate packages or whether the entire lot or shipment covered by the bill of lading was to be considered as the original package. *Id.* at 1026, 207 So.2d at 782. The Court stated:

> "We have no hesitancy in concluding under the facts of this case, that the original packages of casings imported by plaintiff comprised all casings covered by bills of lading and that, when those casings or joints were stored in the warehouse and assorted with other tubing of like dimensions and quality, they were commingled and, in reality, formed part of the retail importer's inventory, thus becoming irrevocably committed to the purpose for which they were ultimately destined, i.e., sale and disposal by plaintiff, under the ruling in the *Youngstown* case. In any case, when a portion of the shipment was sold at retail to plaintiff's customers, all of the joints covered in the bill of lading, which we regard factually, as well as fictitiously, as the original package, lost their previous status as imports and became subject to local taxation. See *May & Co.* v. *City of New Orleans, supra.*"

Volkswagen Pacific, supra, concerned a wholesale distributor of automobiles and automobile parts imported from Germany. *Id.* at 872, 496 P.2d at 1240. Both Volkswagen and Porsche maintained a sales organization with a general sales manager and zone operation managers who assisted dealers with technical, administrative and sales problems. *Id.* at 873, 496 P.2d at 1241. The *amici* believe that a reading of the case indicates that said firms maintained a wholesale distribution system similar to that in this case. The *Volkswagen Pacific* case dealt with two categories of shipments: (1) parts imported in sea vans, and (2) automobiles shipped unpackaged. *Id.* at 874, 496 P.2d at 1242. The parts were conveyed in sea vans to the wholesale distributor's warehouse where they were removed and held until delivered to a dealer. *Id.* at 873, 496 P.2d at 1241. Volkswagen Pacific, Inc. maintained a "five months" inventory of parts, most of which were imported from Germany, although some were supplied by American manufacturers. Upon the arrival of the automobiles, some were transported by an agent of Volkswagen Pacific, Inc. to its dealers to whom they had already been allocated. During the taxable years involved the demand for Volkswagen automobiles exceeded the supply. The remainder

were held in the wholesale distributor's inventory which, commencing in June of 1966, ranged to a high of 9,000 cars. *Id.* at 872, 496 P.2d at 1240.

The California court concluded that the constitutional immunity existed only until the imports are sold or put to the use for which they are imported, citing the *Hooven* case, *supra*. *Id.* at 875, 496 P.2d at 1243. The court observed that it would not follow as a matter of law that the removal of the parts from the sea vans would terminate the exemption, noting that it might be accomplished so that the importer could by other means of transportation direct his imports to his outlets in different interior states. As to *Volkswagen Pacific, supra*, the court stated:

> "In the context of the instant case, however, the opening of the sea van did signify a breaking of bulk 'for the sale or delivery . . . of the separate parcels contained in it' [referring to the *May* case, *supra*], so that California governments may properly tax those separate articles. Uncontroverted evidence shows that once the individual packages were removed from the sea van, VW and Porsche distributed those packages to local dealers. Hence, even if VW and Porsche acted as importers up to the moment that the vans were brought to the warehouse, once they entered the vans to remove the individual packages they did so with the intent and effect to act as wholesalers in 'the mass of property in the country . . . .' (*Brown* v. *Maryland, supra*, 25 U.S. at p. 441.) Therefore, they cannot avail themselves of the constitutional immunity from local taxation.

A more difficult problem exists with reference to the automobiles. They are not shipped in packages, crates or boxes. Thus it is neither possible nor desirable that the validity of the tax here imposed be determined by an artificial effort to create a hypothetical 'original package.' '[T]he test of the original package is not an ultimate principle. It is an illustration of a principle. [Citation] It marks a convenient boundary and one sufficiently precise save in exceptional conditions.' (Where packaging is inherently impossible or impracticable, an imported, unpackaged item loses its immunity from state or local taxation when it is removed from an aggregate of other similar unpackaged items imported as a unit with it.) *Baldwin* v. *G.A.F. Seelig,* 294 U.S. 511, 526-527 [55 S.Ct. 497, 79 L.Ed. 1032, 1040, 101 A.L.R. 55]; see also *E. J. Stanton & Sons* v. *County of Los Angeles,* 78 Cal. App. 2d 181 [177 P.2d 804], hg. den., cert. den., 332 U.S. 766 [68 S.Ct. 75, 92 L.Ed. 352], lumber imported unpackaged held subject to local tax when removed from aggregate of lumber imported by ship and stacked at a local yard; see also *Simon* v. *County of Los Angeles,* 141 Cal. App. 2d 74, 78-79 [296 P.2d 381].) In the case at bench, each automobile was imported unpackaged as part of an aggregate of similarly unpackaged items. Appellants, who claim the immunity from tax and thus bear the burden of establishing the conditions for its existence, have failed to prove that packaging of the automobiles was possible or practicable. Similarly, they have failed to prove that any practical or possible method of packaging would not have been one which of necessity would have required removal of the automobiles from the package for delivery to the dealers to whom they were sold. We thus determine that the trial court properly concluded that the automobiles here involved were not immune from taxation by the import-export clause of the United States Constitution." *Id.* at 875, 496 P.2d at 1243.

The *amici* submit that the Supreme Court of Georgia was correct in deciding in this matter that petitioner's tires were not immune to local taxation. After an extensive review of cases, the court concluded:

> "Appellants' third argument is that imports lose their character as such when sorted and commingled with other shipments preliminary to sale. As we read *Brown* v. *Maryland, supra,* it establishes a 'two-hat' approach to importers for resale. Such importers are free to deal with their goods as imports after the goods are in this country; and, if they do so, the goods remain immune from state taxation. When, however, the importer deals with his goods as a seller, he becomes chief justice marshal's 'itinerant peddler'; and the goods become subject to state taxation. The original packaged doctrine is not a mechanical, universally applicable test; it is, instead, a useful means in many cases of determining which hat the importer-seller is wearing, because frequently the act of breaking the original package is preliminary to converting the imports to salable units.
>
> In the case at bar, the entire Michelin tire inventory was unpackaged, and all shipments in the inventory were commingled and stored by size and type to make the individual units immediately available for resale. We therefore hold that the tires, imported in bulk without packaging, which have been sorted, segregated by size and style, and commingled with other shipments have lost their status as 'imports' and are subject to taxation."

The *amici* submit that, if the containers or sea vans were not packages within the meaning of the original package doctrine, the aggregation of tires in each shipment con-

stituted the original package and, upon the unloading of the containers or sea vans, any metaphysical unity that a shipment may have had an aggregation of items was destroyed when the tires were moved from the container and sorted according to type and size into the various areas of petitioner's warehouse. By injecting the tires into its current inventory designed to service its wholesale distribution wherein such property, as a part of petitioner's constant on-going distribution system, was irrevocably committed to said purpose and was immediately subject to order by petitioner's dealers and customers, such property lost its character as imports. To hold otherwise would be to fly in the face of economic and legal reality. To hold in favor of petitioner would permit petitioner to maintain a profitable business venture, not only in the states of Georgia and Kansas, but elsewhere in the United States, which would enjoy without payment therefor all of the municipal benefits provided by ad valorem taxation in said areas. This would constitute an invidious discrimination in favor of petitioner and against similarly situated firms whose current and on-going inventories contained domestic articles, and in effect, would constitute a violation of the equal protection clause of the Fourteenth Amendment of the United States Constitution. When viewed in this manner, it becomes readily apparent that none of the foregoing results were the rationale behind the export-import clause. The rationale behind the export-import clauses has been fully served once the property has come to rest and has been injected into and becomes a part of petitioner's on-going commercial operation.

CONCLUSION

For the foregoing reasons the *amici* respectfully pray that the judgment of the Supreme Court of Georgia be affirmed.

Respectfully submitted,

CURT T. SCHNEIDER
Attorney General of the State of Kansas

JONATHAN P. SMALL
CLARENCE J. MALONE
Assistant Attorneys General of the State of Kansas
1st Floor—State Capitol
Topeka, Kansas 66612

LYNDUS A. HENRY
County Counselor for Johnson County, State of Kansas

BERNIS G. TERRY
Special Counsel for Johnson County, State of Kansas
Johnson County Courthouse
Olathe, Kansas 66061

F. KENT KALB
General Counsel
Department of Revenue

WILLIAM F. ALDRIDGE
Chief Attorney
Property Valuation Division
State Office Building
Topeka, Kansas 66612

Attorneys for the Amici